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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, et al.,

On Appeal From The United States Court of Appeals
For The District of Columbia Circuit

JURISDICTIONAL STATEMENT

JOHN A. MYLER
Deputy General Counsel
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Attorney for Appellant

Counsel of Record

QUESTIONS PRESENTED

1. Whether the requirements of Article III, § 2, of the Constitution, which limits the judicial power of the United States to the resolution of "cases" and "controversies," are satisfied where retail purchasers of natural gas allege injury from the decision of the Federal Energy Regulatory Commission, not to extend program of incremental pricing, as basis for challenge to the constitutionality of section 202(c) of the Natural Gas Policy Act, 15 U.S.C. § 3342(c).

2. Whether section 202(c) of the Natural Gas Policy Act, 15 U.S.C. § 3342(c), is severable from the rest of section 202, where there is no severability clause in the Act and where the proposed rule required by section 202(a) can take effect only through the congressional review procedure provided by section 202(c).

3. Whether revocation by the Federal Energy Regulatory Commission of the rule proposed pursuant to section 202(a) rendered moot the constitutionality of section 202(c).

4. Whether section 202(c) of the Natural Gas Policy Act, which provides for expansion of an experimental program of "incremental pricing" of natural gas only upon failure of both houses of Congress to disapprove, is constitutional.

5. Whether delegation of rulemaking authority to the Federal Energy Regulatory Commission for extension of incremental pricing without standards governing appropriate application is constitutional.

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AMERICAN GAS ASSOCIATION,[1]

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v.

CONSUMER ENERGY COUNCIL OF AMERICA, et al.[2]

On Appeal From The United States Court of Appeals
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JURISDICTIONAL STATEMENT

OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 673 F.2d 425. The

[1] The listing of all member companies of the American Gas Association, their parents, subsidiaries and affiliates required by Rule 28.1 of the Supreme Court Rules is provided in Special Appendix A herein. References to "Appendix" or "App." are to the (joint) Appendix to Jurisdictional Statement submitted April 29, 1982, by the Process Gas Consumer Group, et al., in a related case, No. 81-2008.

[2] Petitioners in the Court of Appeals included Consumer Energy Council of America ("CECA"), Consumer Federation of America, and Public Citizen. The named respondent was the Federal Energy Regulatory Commission, with the American Gas Association, United Distribution Companies, Interstate Natural Gas Association, Process Gas Consumers Group, and Petrochemical Energy Group, intervenors in support of respondent. The United States appeared as amicus curiae in support of petitioners, while the United States Senate and the Speaker of the House of Representatives appeared as amici curiae in support of respondent. Motions to intervene filed, after the issuance of the court's judgment, by the United States Senate and the Speaker of the House of Representatives were granted by the court of appeals on March 2, 1982.

Federal Energy Regulatory Commission's (FERC) rule-proposal included in Order No. 80, App. at 123a-195a, is published at 45 Fed. Reg. 31622 (1980). FERC's decision denying rehearing of and revoking Order No. 80, App. at 196a-203a, is reported at 45 Fed. Reg. 54741 (1980), and its decision denying rehearing of its revocation of Order No. 80, App. at 204a-206a, is reported at 45 Fed. Reg. 71780 (1980).

JURISDICTION

This is an appeal from a decision of the United States Court of Appeals for the District of Columbia Circuit, issued January 29, 1982, holding unconstitutional section 202(c) of the Natural Gas Policy Act of 1978 [hereinafter "NGPA"], 15 U.S.C. §3342(c). Federal jurisdiction in that court was based on section 506 of the NGPA, 15 U.S.C. §3416. A timely petition for rehearing was filed February 26, 1982, by the American Gas Association and was denied March 10, 1982. App. at 210a. Timely Notice of Appeal was filed by the American Gas Association March 26, 1982, in the United States Court of Appeals for the District of Columbia Circuit. App. at 220a.

The jurisdiction of this Court is invoked under 28 U.S.C. §1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and sections of the Natural Gas Policy Act are set forth in the Appendix. App. at 222a-231a.

STATEMENT OF THE CASE

1. THE NATURAL GAS POLICY ACT[3] AND ITS LEGISLATIVE HISTORY

The Natural Gas Policy Act of 1978 ("NGPA") was the

[3]Pub. L. No. 95-621, 92 Stat. 3351 (codified at 15 U.S.C. §§3301-3324).

product of extended, difficult and intense congressional consideration, aptly described by Speaker of the House O'Neill:

> We have struggled with this issue now for 18 months. The Congress has spent more floor hours, more committee hours, more conference hours, and more task force hours on this legislation than it has on any other issue before the 95th Congress . . .
>
> It is the most difficult issue that has been faced by any Congress in this century. For many of you, it is perhaps the most difficult vote you will ever have to cast in your political career . . .

124 Cong. Rec. H13413 (daily ed. October 14, 1978).

The basic problem underlying the need for this legislation was the inability of the price-regulated interstate natural gas market to provide sufficient volumes to meet national demand for gas. The causes of the problem were the low prices imposed on the interstate market and the need for financial incentives to encourage production. Titles I and II of the NGPA reflect the basis of the compromise forged to provide a solution. Title I established higher incentive prices for "new" gas, the production of which had not yet begun, and deregulated the wellhead price for such gas as of January 1, 1985. Gas for which no further incentive was necessary to encourage production, i.e. "old" gas, with regulated prices which already reflected production incentives, continued to be regulated. Congress believed that unregulated wellhead pricing of new gas would cause significantly higher fuel prices for residential and other high-priority users, and adopted Title II as a means to monitor the rise in gas prices vis-a-vis other fuels and to prevent high-priority users' fuel bills from becoming unacceptably high. Title II was intended to allow the residential user to avoid in part the direct effect of such increases by alloting certain portions of the incremental increases in costs to industrial users.

Title II was itself the product of hard negotiation between the House and the Senate. The original bill proposed by the Senate included incremental pricing for industrial users served by interstate pipelines. The House sought heavier protection for high priority users by requiring incremental pricing for all low priority users served at both the interstate pipeline and

distribution company levels. The compromise reached was to accommodate the House's desire for stronger "protection" of homeowners but to withhold broad application of this new pricing program pending experimentation with a small class of industrial users, i.e. those using gas for boiler fuel use. Title II also placed a ceiling on the maximum price industrial users would pay for the gas in order to assure natural gas a continued competitive market position; the incremental surcharge could not increase the cost of gas above the equivalent cost of alternate fuels. The decision to withhold wide application of incremental pricing was based on the very real fear that industrial users would stop buying gas and leave homeowners to pay larger portions of fixed costs.

The initial application by rule of incremental pricing, to boiler fuel users, was thus required. Section 201 of the NGPA provided that a rule be established within one year of enactment.[4] Expansion of incremental pricing, however, was not required. Section 202(a) provides two parallel and inter-dependent mandates in tandem. Section 202(a)(1) directs the FERC to "prescribe an amendment to the [Section 201] rule"[5] to extend incremental pricing to other industrial users. Section 202(a)(2) allows the proposed amendment "to take effect only as provided under subsection (c) of this section."[6] Subsection (c) provides Congress with an opportunity to review and veto the proposed expansion of incremental pricing [hereinafter "Rule II proposal"]. Expansion would take effect after thirty legislative days "unless, during such 30-day period of continuous session of Congress, either House of Congress adopts a resolution of disapproval"[7] FERC could, upon disapproval, submit another amendment to Congress only after a six-month interval and before a two-year period from the first disapproval resolution expires.[8]

The Report issued by the Conference Committee and the legislative history of the NGPA in general confirm the

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[4] 15 U.S.C. §3341.
[5] *Id.* §3342(a)(1).
[6] *Id.* §3342(a)(2).
[7] *Id.* §3342(c)(1).
[8] *Id.* §3342(c)(2)(B).

contingency of any extension of incremental pricing upon approval by Congress. Specifically, the Conference Report provides:

> A two stage process is utilized for identification of users who will be subject to incremental pricing. First, the Commission is required to develop a rule, within 12 months after the date of enactment, for implementation of incremental pricing applicable to certain industrial boiler fuel facilities. Second, the Commission is required to develop an amendment to the first rule, within 18 months after the date of enactment, for implementation of incremental pricing to other industrial users. This amendment to the first rule will be submitted to Congress for review. The amendment becomes effective unless disapproved by either House of Congress. If the second rule is disapproved, the Commission may submit a substitute proposal for review under the same procedure.[9]

Equally compelling are statements made in debate by Senator Jackson, chief sponsor of the Conference Report. In response to questions about possible loss of industrial consumers of gas owning to increased prices, Senator Jackson noted:

> [T]his *bill does not compel* incremental pricing with respect to any industrial use other than in large boilers. Extension of incremental pricing beyond boiler use *could be prevented* by a majority vote of either House of Congress. . . .

124 Cong. Rec. S15221 (daily ed. September 15, 1978) (emphasis added). Senator Percy then indicated his support for the proposed legislation, stating:

> Some contend that the combination of incremental pricing provisions and curtailment priorities may drive large industrial gas users to oil. That would increase the demand for imported oil and *increase the residential consumers' cost of gas.* Both are very serious

[9] S. Rep. n. 95-1126 (H.R. Conf. Rep. No. 95-1752), 95th Cong., 2d Sess. [hereinafter cited as "Conference Report"], *reprinted in* [1978] U.S. Code Cong. Admin. News 8983. Cited here at 95-97, U.S. Code Cong. Admin. News at 9012-13.

> problems. But we now have the assurance that enough flexibility will be built into the incremental pricing regulations to eliminate those problems.
>
> *[W]e must keep in mind that the second incremental pricing rule – the one with wide application – is subject to a one House veto. If we do not like incremental pricing, we can vote it down then. It is not a reason to vote against the whole bill now.*

Id. at S15222 (emphasis added). Similarly in the final House debate on the Conference Report, Representative Dingell noted the conferees had provided statutory guarantees against the prospect that incremental pricing would drive industrial users off natural gas and onto other fuels, a result "contrary to the very purpose of the bill's provision" (124 Cong. Rec. H13,114 (daily ed. October 14, 1978)), and of concern to many in Congress. The very first of the statutory guarantees identified by Representative Dingell was that:

> The *mandatory requirements* of incremental pricing *apply only to boiler fuel* users. Any broadening of incremental users is subject to congressional review and single House veto.

Id. at H13115 (emphasis added).

2. AGENCY DEVELOPMENT OF PROPOSED RULE

On September 28, 1979, the FERC issued final regulations implementing section 201 of the NGPA, establishing the incremental pricing surcharge to certain industries using natural gas as a boiler fuel.

The FERC initiated the development of its Rule II proposal, designed for expansion of the incremental pricing program by issuing a notice of proposed rulemaking November 15, 1979.[10] On May 6, 1980, having completed its assigned task, the FERC issued, subject to congressional review, the "Rule Required under Section 202 of the Natural Gas Policy Act."[11]

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[10] Notice of Proposed Rulemaking and Public Hearings, FERC Docket No. RM80-10, 44 Fed. Reg. 67170 (November 23, 1979).

[11] App. at 123a.

which would have expanded the program to all industrial end-users not exempt under the NGPA. The Commission viewed its role as limited to using its technical expertise to present to Congress a Rule II proposal the merits of which would be judged by Congress.

> By virtue of the very review procedures built into section 202, it seems clear that the Congress sought to have this Commission develop a meaningful Phase II rule. The Congress would not have a meaningful choice if the Commission were to offer no rule, or a very narrow rule, for its review. The Congress has reserved to itself the fundamental judgement as to whether an expansion of incremental pricing is consistent with current national priorities.[12]

3. HOUSE VETO

The Report of the House Committee on Interstate and Foreign Commerce, accompanying a resolution (H.Res. 655) disapproving the rule proposed under section 202, indicated that the committee "accepts the Commission's determination that incremental pricing, as embodied in this rule, is ill-suited to accomplish market ordering or price sheltering"[13] (the dual goals considered by Congress in establishing Title II). The Committee noted particularly the Commission's finding that incremental pricing does not appear to generate the type of demand restraint that Congress sought[14] and the threat of increased residential costs resulting from industrial load loss.[15] On May 20, 1980, the resolution of disapproval passed the House by a vote of 369-34.[16]

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[12] *Id.* at 125a.
[13] *Id.* at 120a.
[14] *Id.* at 11.
[15] *Id.*
[16] H.R.Res. 655, 96th Cong. 2d Sess. 126 Cong. Rec. H3855 (daily ed. May 20, 1980).

4. AGENCY REVOCATION OF PROPOSED RULE

CECA filed with FERC, on June 5, 1980, a petition for rehearing of Order No. 80 making a single argument – that FERC should remove from the Rule II proposal language making its effectiveness contingent upon failure of either house to disapprove, which contingency CECA argued was unconstitutional. On August 1, 1980, FERC denied rehearing of Order No. 80 and revoked the still ineffective proposal, noting that the possibility of Order No. 80 becoming effective, should the legislative veto provision in section 202 be found unconstitutional, would be most "inadvisable."[17] The Commission stressed that it had not made the difficult findings which would reflect Commission approval of the Rule II proposal, and pointed out two serious problems with the proposal which militated against adopting it: (1) the possibility that the minimal savings anticipated to accrue to high-priority users would be more than completely offset in two ways, both in a strict monetary sense, through increased prices for consumer goods, and in a broad social sense, by the significant surcharges and increased reporting and accounting costs incurred by users subject to the expanded program.[18]

CECA sought rehearing of the August 1 order insofar as it revoked Order No. 80, arguing the Commission lacked power to revoke a rule required by statute and that the revocation violated the notice and comment requirement of the Administrative Procedure Act, 5 U.S.C. §553. On October 2, 1980, FERC denied rehearing, concluding that reasoned decisionmaking required revocation of the Rule II proposal and that sufficient opportunity for notice and comment was provided prior to Order No. 80's issuance.[19]

CECA filed petitions for review of FERC's August 1, 1980, and October 2, 1980, orders on September 26, 1980 (No. 80-2184) and October 24, 1980 (No. 80-2312). The court of appeals consolidated the petitions for review on November 7, 1980.

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[17] App. at 199a.

[18] *Id.* at 200a-201a.

[19] *Id.* at 204a-207a.

5. OPINION BELOW

The court of appeals dismissed the contention of Congressional amici that this case should have been brought in the district court on an action for mandamus and determined it had jurisdiction. App. at 17a-20a. The court then considered the issue of severability, rejecting argument that it should determine petitioners' standing to bring the lawsuit on the basis of its determination that section 202(c) is severable from section 202(a).[20] After rejecting another threshold contention of respondents and intervenors, mootness, the court of appeals found the one-house veto unconstitutional. In applying its remedial powers, having found a violation of the notice and comment procedures required by the APA, the court ordered that the Rule II proposal shall take effect. The issuance of the court's mandate has been withheld by the court's order, and by Rule 41 of the Federal Rules of Appellate Procedure.

a. STANDING

Petitioners' complaint before the FERC, recited again to the court of appeals, was that they were injured by the FERC's failure to establish Order No. 80 without condition that neither house disapprove. The apparent injury alleged was that, absent a Rule II, the cost of natural gas to the consumers who are members of the organizations comprising CECA will be increased.

Intervenors American Gas Association, Interstate Natural Gas Association of America, and United Distribution Companies argued that petitioners had provided no explanation of a cognizable injury to a legal right enjoyed by petitioners, citing *Warth v. Seldin*, 422 U.S. 490, 499-501 (1975) and *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). Intervenors' position was that section 202 had created no legally enforceable right in petitioners to an extension of incremental pricing and further that petitioners failed to establish injury remediable by a court.

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[20] App. at 22a.

The circuit court opinion's only reference to the issue of standing was a finding that, in light of its ruling that section 202(c) was severable from the remainder of section 202, the question of petitioners' standing to initiate this lawsuit need not be addressed. App. at 22a n.48.

Intervenor American Gas Association included in its timely Petition for Rehearing and Suggestion of Rehearing *en Banc* further argument, based on Article III requirements and citing *Valley Forge, Christian College v. Americans United For Separation of Church and State, Inc., et al.*[21] that petitioners had established no interest cognizable by the federal judiciary. On March 10, 1982, the court denied the petition for rehearing without discussion.

b. SEVERABILITY

Relying exclusively on legislative history, the circuit court found an affirmative answer to the question it posed as determinative, i.e. whether Congress would have enacted the remainder of the statute without the unconstitutional provision.[22] App. at 24a. Citing *United States v. Jackson*,[23] the court found irrelevant the presumption of inseverability that attaches where a statute includes no severability clause as articulated in *Carter v. Carter Coal Co.*[24] The court's discussion of severability included no construction of the statute. The court's conclusion that section 202(c) is severable was based on the court's reading of the conference report accompanying the NGPA and selected floor debates. Claiming that the conference report "fails to mention" in its summary of Title II the legislative review provision contained in section 202, the court found the conference report to support petitioners' argument for severability. App. at 25a.[25] Noting that only two statements, by Senator Jackson and

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[21] 102 S. Ct. 752 (1982).

[22] FERC, congressional *amici* and intervenors argued inseverability, relying on the statute's language and its legislative history.

[23] 390 U.S. 570, 585 n.27 (1968).

[24] 298 U.S. 238, 312 (1936).

[25] Elsewhere, the report describes the operation of the veto straightforwardly. See Conference Report 94-97.

Congressman Dingell, were made during debate over incremental pricing emphasizing the availability of congressional review of any extension, the court construed this perceived silence as evidence that Congress would have enacted both phases of incremental pricing without the veto provision. App. at 25a-28a. In the absence of the veto, the scope of the Phase II rule "would have been left to the Commission's discretion" App. at 29a, and thus, found the court, the veto was not essential to the statutory policy and is severable. App. at 30a.

c. MOOTNESS

FERC, congressional amici, and intervenors argued that this case is moot because of an appropriate revocation by FERC of its Rule II proposal. The court found FERC's revocation order invalid because it was issued without notice and opportunity for comment, and specifically declined to reach the issue of whether FERC was authorized to revoke the rule. App. at 31a. The court construed the term "rule making" utilized by the Administrative Procedure Act to be applicable to FERC's revocation.[26] App. at 33a. Further, the court found no good cause existed for FERC to dispense with notice requirements. App. at 36a.

d. CONSTITUTIONALITY

Petitioners made four separate constitutional attacks on the legislative veto provision in section 202(c), claiming that the veto (1) violates the constitutional doctrine of separation of powers, (2) deprives the President of his veto power under Article I, Section 7 of the Constitution (the Presentment Clause), (3) violates Article I, Section 7's requirement of bicameralism, and (4) delegates legislative authority without standards or provision for judicial review. FERC, the Process Gas Consumers, and the Petrochemical Energy Group did not address these issues. The United States Senate and House of Representatives and intervenors American Gas Association, Interstate Natural Gas Association of America, and United

[26] 5 U.S.C. §551 (5) defines "rule making" as "agency process for formulating, amending, or repealing a rule."

Distribution Companies argued that none of these claims were established.

The Court of Appeals found section 202(c) unconstitutional as (1) preventing the President from exercising his veto power and permitting legislative action by only one house of Congress, and (2) contravening the separation of powers principle implicit in Articles I, II, and III because it authorizes the legislature to share powers properly exercised by the other two branches. The court did not reach the undue delegation issue. App. at 37a.

e. REMEDY EMPLOYED

Intervenors argued that if section 202(c) is declared unconstitutional, the appropriate remedy would be a remand to the Commission for further consideration. Intervenors pointed out that not one but two branches of government have decided against any expansion of incremental pricing.

The circuit court held that, because of the FERC's failure to provide notice and opportunity for comment on the revocation of the Rule II proposal, the rule shall take effect, thirty days from the date of the decision.[27] The circuit court noted that the Commission may use the thirty days to consider whether to amend the substance of the rule or to postpone the effective date further. The court again, however, declined to discuss "the precise scope of the Phase II delegation or the extent, if any, of the Commission's power to delay, amend, or revoke the rule." App. at 104a.

6. PETITION FOR REHEARING

On February 26, 1982, intervenor American Gas Association filed a timely Petition for Rehearing and Suggestion of Rehearing En Banc. A.G.A. argued that the case is extraordinarily important because the circuit court's judgment would result in a rule, rejected by Congress and the FERC, going into

[27] By letter dated February 10, 1982, the clerk of the court of appeals notified parties that, upon issuance of the mandate, the thirty-day period would begin. Issuance of the mandate remains stayed.

effect and possibly causing dramatically higher rates for high priority users of gas resulting from industrial load loss. Had the court decided any of three preliminary issues correctly, neither this exposure to severe economic dislocation nor the confrontation between the legislative and executive Branches would have been caused. The three preliminary issues on which rehearing was sought included: (1) whether Article III requirements were satisfied by petitioners' reliance on section 202 as creating a legal right to extension of incremental pricing, (2) whether the veto provision is severable from the rest of section 202, and (3) whether FERC's revocation mooted the case. Further, A.G.A. argued that only by according an undefined "legal force" to the inchoate Rule II proposal between its issuance by FERC and its veto by the House of Representatives is the court able to find any interference with Executive Branch discretion.[28]

Without discussion, the petition for rehearing was denied March 10, 1982.

THE QUESTIONS ARE SUBSTANTIAL

The extension of incremental pricing still carries with it the potential for severe injury to the economic interests of high priority users (including petitioners), all other users of natural gas, and of the entire natural gas industry. The circuit court's judgment below also has significant and far-reaching effects on issues of importance to all federal courts, including constitutional challenges brought under "citizen standing" concepts, appropriate judicial consideration of severability clauses, the breadth of administrative discretion granted by statute, and the propriety and necessity of reaching constitutional questions. The ultimate constitutionality of a one-house veto is clearly an issue of fundamental governmental importance. However, that issue should not have been reached in this case.

a. ARTICLE III REQUIREMENTS

By proceeding directly to petitioners' constitutional arguments, without determining petitioners' standing to bring this

[28] "Clearly the agency rule has some legal force that a proposed bill does not." App. at 74a.

lawsuit, the circuit court effectively removes any limitations imposed by Article III of the Constitution on the federal judiciary's power to determine the constitutionality of legislative or executive acts. Under no reasonable reading of the statute in question do petitioners obtain an interest cognizable by a federal court, nor are they injured by acts of Congress or the FERC. "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). However, suitors must show "distinct and palpable injury", and also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Duke Power Co. v. Carolina Env. Study Gp.*, 438 U.S. 59, 72 (1978). The circuit court declared that its finding of severability mooted the question of petitioners' standing, since the court found that Congress had committed itself to a policy in favor of incremental pricing's expansion.[29] From this holding flows the court's conclusion that section 202(c) violates Article I, section 7 and the separation of powers doctrine. App. at 84a-85a. By declining to analyze the statute in terms of the legal rights it does and does not create in consumers of natural gas, the court is able to reach the merits of the lawsuit petitioners seek to have adjudicated. However, under no reasonable reading of the statute is a cognizable interest granted to petitioners.

First, Petitioners are barred from seeking review of the FERC orders in question by the terms of the NGPA itself. Title V of the NGPA deals specifically with administration, enforcement and review. Judicial review of certain orders and rules issued under the NGPA is provided in section 506, 15 U.S.C. §3416. Thereafter, in section 507, Congress provided a separate means of review for certain specified provisions, including the Rule II proposal submitted under section 202. Review of such provisions is to be done by Congress itself,

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[29] The circuit court accords legal "force" to the inchoate Rule II proposal between its issuance by FERC and its veto by the House of Representatives. App. at 74a-84a. Consequently, the court finds the veto to have "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect." App. at 74a.

and not by courts. Further, section 506(b), under which review is sought here, limits judicial review to a rule or order within the meaning of 5 U.S.C. §551(4):

> "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and further effect designed to implement, interpret, or prescribe law or policy . . ."

The Rule II proposal patently never attained "applicability" or "further effect" and no judicial review thereof is provided.

Secondly, section 202 evidences no legislative commitment, incorporated in the statute, to an expansion of incremental pricing and thus the decision of FERC not to expand the program causes no injury traceable to its orders challenged here. And, even assuming for purposes of standing analysis that the court of appeals was correct on severability, the informed judgment of FERC to revoke the Rule II proposal after the House's veto invades no legal right of petitioners because FERC's decision was required as the appropriate exercise of responsibilities assumed to be delegated lawfully. Finally, assuming a right was created within petitioners to whatever price shielding might result from expansion, any injury suffered by petitioners from FERC's decision to limit incremental pricing amounts to no more than a generalized grievance most appropriately addressed in the representative branches.

It is important that the only injury possibly cognizable here would be to a vested interest in petitioners, created by section 202(a), in the expansion of incremental pricing and the alleged concomitant price shielding. Both the statute itself and its legislative history compel the conclusion that no vested right in the expansion of incremental pricing was created.[30] Subsection (a) provides two parallel mandates *in tandem*: (1) FERC shall prescribe an amendment to Section 201's rule; and (2) such amendment can take effect *only* as provided in subsection (a)(2). The very structure of subsection (a) thus

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[30] Even the circuit court agreed that the Rule II proposal would go into effect only if neither House disapproves. "No one disputes that this was the *intent* of section 202 as enacted." App. at 25a.

provides the tools for "attuning the mind to a vision comparable to that possessed by the legislature."[31] First, it is clear that the amendment and its possible effectiveness must be considered together.[32] Second, except for the means identified in (a)(2), the statute includes *no other possible way* in which the amendment *can* take effect. The inescapable conclusion is that Congress completed no delegation of authority to FERC to establish as effective the amendment described in section 202.

The legislative history is replete with indicia of Congressional uncertainty as to the ultimate efficiency and value to the high-priority user of an incremental pricing program. Clearly the right of Congress to review the FERC's proposal before determining it desirable was considered by Congress an extremely politically attractive aspect of the bill.[33] As reflected in the statute it drafted, Congress would make no commitment to expansion of incremental pricing, unless convincing proof of its value became later apparent through the experience gained from Phase I. Theoretical and insubstantial savings to high priority consumers could easily be more than off-set by the impacts of economic forces unleashed by the program.[34] The purely speculative nature of the benefits claimed, apparent to Congress and the FERC alike, precludes a finding of "actual injury redressable by a court." *Simon v. Eastern Kentucky Welfare Rights Org.* 426 U.S. 26, 39 (1976).

Assuming the unconstitutionality of section 202(c), severability, and a constitutional delegation of responsibility to FERC, the agency's revocation of the Rule II proposal

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[31] Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886, 892 (1930).

[32] "The rule that words are to be read in context with the neighboring words in the same document (noscitur a sociis) recognizes that in the field of communication the whole transcends the parts. The whole statute is an extension of this principle, as is the rule that statutes on the same subject (*in pari materia*) are, when enacted by the same jurisdiction, to be read in relation to each other. These broad principles are both relevant and valuable, because they reinforce the use of proper context." R. Dickerson, The Interpretation and Application of Statutes 233 (1975).

[33] See remarks of Senators Jackson and Percy, pp. 6-7 and of Congressman Dingell, p. 7, *supra*.

[34] The maximum savings deemed even theoretically possible to accrue, as a result of both Phase I and the Phase II extension of incremental pricing, to a high-priority user were estimated at $18 per year. App. at 200a.

caused no injury to any right created by Title II. FERC's responsibility was to implement the law in accord with legislative intent, which necessarily required consideration of the same various economic dislocation factors attendant to expansion of incremental pricing originally considered by Congress. If the attempt by Congress to retain the right to a later decision on expansion fails, FERC's statutory responsibility was nonetheless to make the decision for Congress in a manner faithful to the manner in which Congress anticipated making the decision itself. FERC did so and, faced with CECA's Petition for Rehearing, assumed for the first time the responsibility for judging the merits of the proposal and concluded that expansion would expose the marketplace to "significant disruption," which would be most "inadvisable." App. at 199a. No legally enforceable right can be inferred to require the opposite decision.

Assuming this Court finds the minimum showing of injury has been made, prudential principles preclude consideration of petitioners' complaint. No protectable interest in expansion was provided. *See Data Processing Service v. Camp*, 397 U.S. 150, 153 (1969). Further, the question of the societal benefit of incremental pricing should be addressed in Congress, not the courts. Here, the original uncertainty expressed in Congress over price shielding ever ultimately occurring was repeated each time the issue was reconsidered. FERC noted that the Rule II proposal "might be an imperfect instrument for sheltering high priority users from the economic impacts of rapidly increasing natural gas prices." App. at 200a. The House of Representatives agreed. Any such ultimate price shielding so postulated is nonetheless immeasurable by a court, because of the innumerable factors which either cause or preclude its existence. It is a policy question addressed most constructively in legislatures. *See Warth v. Seldin*, 42 U.S. 490, 499 (1975).

b. SEVERABILITY

The court's conclusion is wrong because of its failure to construe the statute itself which gives clear structural and textual direction compelling the conclusion that subsection

(c) is inextricably intertwined with subsection (a). Subsection (a) reads as follows:

> (a) IN GENERAL –
>
> (1) COMMISSION RULE – Not later than 18 months after the date of the enactment of this Act the Commission shall, by rule, prescribe an amendment to the rule required under Section 201 designed to provide for the provisions of this title, of the costs of natural gas which are –
>
> (A) described in Section 203, and
>
> (B) incurred by an interstate pipeline.
>
> (2) EFFECTIVENESS – The amendment required by this section, and any amendment to the rule under section 201 which is applicable to facilities to which the amendment required by this section applies (other than a technical or clerical amendment), shall take effect only as provided under subsection (c).

As argued above in the context of standing, the separate portions of subsection (a) should be considered together. Thus, the amendment and the means of its effectiveness must be considered together. Indeed, no other possible manner, beyond the legislative review process identified in subsection (a)(2), exists for the amendment to become effective. If the "plain meaning rule" is to have any vitality, the "amendment" required by section 202(a)(1) must be construed as so inextricably intertwined with the specific means provided to make it effective, section 202(a)(2), that to preclude the means of effectiveness must disintegrate the amendment.[35] The real

[35] "If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the fact of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." *Lake County v. Rollins*, 130 U.S. 662, 670 (1899).

issue here, never addressed by the court, is the inseverability of Section 202(a)(1) from Section 202(a)(2), not merely that of Section 202(c) from Section 202(a). The resolution is clear: the two subsections are inseverable. The effect is also clear. If the veto is unconstitutional, all of section 202 falls, and no Rule II is possible. *McCorkle v. United States*, 559 F.2d 1258 (4th Cir., 1977) *cert. denied*, 434 U.S. 1011 (1978).

Indeed, the legislative history of this Act, strewn with the conflicting statements of desirable policy inherent in the legislative process underlying a major bill devoted to major revision of a major industry, provides strong evidence of the wisdom inherent in the principle that courts should read the words of a statute first. Nonetheless, the colloquies between Senators Jackson and Percy (see pp. 6-7, *supra*) provide ample evidence that expansion of incremental pricing was not intended to occur independently of legislative review.

The circuit court also disregards entirely the presumption of inseverability articulated by this Court in *Carter v. Carter Coal Company*, *supra*, applicable when statutes include no severability clauses. That presumption is supported by common sense: "When the questioned clause restricts a power granted by the legislature the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's interest." *McCorkle v. United States, supra* at 1261.

c. MOOTNESS

After Congress prevented extension of incremental pricing, the Rule II proposal remained what it had been, a legal nullity. Consequently, FERC properly performed the ministerial task of withdrawing the proposal. The circuit court wrongly concludes that the FERC violated the requirements of the Administrative Procedure Act (APA) of public notice and opportunity to comment before withdrawing the proposal.[36] Such application of the APA is error because the NGPA applied the requirements of the APA *only* to a "rule or order issued under this Act *having the applicability and effect* of a *rule* as

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[36] App. at 31a-36a.

defined in Section 551(4)"[37] of the APA. The definition of "rule" provided by Section 551(4) does not include the Rule II proposal because the proposal never operated as a rule. Again, section 551(4), in pertinent part, provides:

> "(4) 'rule' means the whole or a part of and agency statement of *general* or particular *applicability* and *further effect* designed to implement, interpret, or prescribe law or policy . . ." (Emphasis added)

The Rule II proposal, which could become effective *only* pursuant to Section 202(a)(2), never did so; nor did it ever attain any applicability or future effect. Hence the APA's requirements do not apply to its revocation, which was proper and the case has been mooted because there is no rule to be challenged.

d. CONSTITUTIONALITY

The court of appeals held section 202(c) unconstitutional on two bases. First, it found that the veto provision violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress. Secondly, it found that the one-house veto contravenes the separation of powers principle implicit in Articles I, II, and III because it authorizes the legislature to share powers properly exercised by the other two branches. App. at 37a.

Both conclusions flow from a misunderstanding of what Congress did and did not do in the passage of the NGPA. In fact, no legislative action occurred through the resolution of disapproval passed by the House of Representatives. The only policy choice legislated in Title II was provided in section 201. That responsibility, to establish incremental pricing for boiler fuel users, was delegated to and implemented by FERC. Section 202 provided Congress the opportunity to make a discrete

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[37] *See* NGPA Section 502(a), 15 U.S.C. §3412. Further, section 501(a) authorizes FERC to (prescribe . . . and rescind such rules and orders as it may find necessary or appropriate to carry out it functions under this Act."

legislative choice on expansion at a later date.[38] That legislative choice was limited to acceptance or rejection of a specific proposed rule. The rule would take effect as proposed if both houses of Congress, after the amendment had been submitted by FERC to each house, determined not to veto the rule.[39] No discretion was retained by Congress to change the terms of the proposed rule and thereby become involved in the administrative process.

The fundamental error made by the panel is to accord some undefined "legal force" to the inchoate Rule II proposal between its issuance by FERC and its veto by the House of Representatives.[40] Only by conferring, without authority, such legal force can the court find any Executive Branch discretion allegedly interfered with by the veto. But no delegation by Congress occurred. The panel's leap of faith ("Clearly the agency rule has some legal force that a proposed bill does not."[41]) is never supported. Neither the statute nor its legislative history provides a basis to infer such delegation.

The circuit court quotes Alexander Hamilton for the proposition that this veto provision wrongfully allows Congress to participate prospectively in approval or disapproval of law enacted by the executive branch pursuant to a delegation of authority by Congress. App. at 94a.[42] The more reasonable application of Hamilton's complaint is against judicial construction

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[38] Even the Court Appeals recognized that Congress believed that it had decided nothing about expansion of incremental pricing in Title II. "It unquestionably is true that Congress sought to avoid a definitive decision on extension of incremental pricing." App. at 78a, n.172.

[39] The circuit court recognized "that in practice, Congress will usually take some "action" when it determines not to veto a rule . . ." App. at 77a n.170. Indeed, for the constitutional questions addressed by the court of appeals to be ripe for adjudication, both Houses of Congress would have had to determine *not* to pass a resolution of disapproval, which would have allowed the Rule II proposal to go into effect without the President having the opportunity to exercise Article I veto authority directly. *See Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.).

[40] App. at 74a-84a.

[41] *Id.* at 84.

[42] "Law is defined to be a rule of action; but how can that be a rule which is little known and less fixed?" THE FEDERALIST No. 62, at 414 (A. Hamilton), (P. Ford ed. 1898).

as "law" of an effort by Congress to utilize executive branch expertise in fashioning an incremental pricing extension proposal for later, and more informed, consideration of the merits thereof by Congress.

e. DELEGATION

The circuit court, as predicate to its finding of a violation of the Presidential veto power under Article I, Section 7, found that section 202 was a delegation of power to the Executive Branch comporting with the "essentials of the legislative function," and thus not unconstitutional as undue and standardless.[43] App. at 76a. Those essentials include "the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct," the specification of "the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."[44] The court of appeals, rejecting argument from both houses of Congress that the section 202(a) Rule II proposal was never an effective law, finds that section 202 gave FERC discretion to issue a rule that would "attain binding legal effect without further congressional action,"[45] and thus that the House veto "changed national incremental pricing policy."[46] As shown above, the legislative action contemplated by section 202 in order for binding legal affect to be attained, that is, a determination by both houses that the proposal was appropriate, never occurred. No delegation of power to FERC was effected. The effect of the circuit court's holding is to construe Title II as legislation by accident.

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[43] *Yakus v. United States*, 321 U.S. 414, 424 (1944).

[44] *Id.*

[45] App. at 79a.

[46] App. at 84a. The circuit court is willing to accept congressional amici's statement that the House, invetoing the Rule II proposal, was making a "social policy judgement" (Op. at 80) but disregards their representations establishing that it was at the time of the House's consideration of the veto that, *for the first time*, Congress made a determination of whether there existed the basic conditions of fact upon whose existence an extension of incremental pricing should occur. The House found that such conditions of fact did not exist and vetoed the proposal.

Moreover, if a delegation is found to have occurred under section 202, FERC has been provided with no direction as to the extent of appropriate expansion of incremental pricing. Section 202(b) directs the Commission to define both the "industrial use" of natural gas and a category of industrial facilities to which the expansion shall apply. But nowhere does the statute indicate the factors to be considered by FERC in establishing such definitions, which obviously constitute the very structure of an expanded program.

If the constitutionality of section 202 is properly reached, the statute must fall in its entirety, as a "sweeping delegation of legislative power" unconstitutional under *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1934).

CONCLUSION

Probable jurisdiction should be noted in this case.

Respectfully submitted,

JOHN A. MYLER
Deputy General Counsel
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209

Attorney for Appellant
Counsel of Record

APPENDIX

AMERICAN GAS ASSOCIATION, (including, where applicable, parents, other than wholly-owned subsidiaries, and affiliates):

ALABAMA GAS CORPORATION
- ALAGASCO, INC.
- ALAGASCO ENERGY COMPANY, INC.
- ALAGASCO PIPELINE COMPANY
- APPLEX EXPLORATION CORP.

ALASKA GAS & SERVICE COMPANY

ALGONQUIN GAS TRANSMISSION COMPANY
- ALGONQUIN ENERGY, INC.

AMERICAN NATURAL RESOURCES COMPANY
- MICHIGAN WISCONSIN PIPELINE COMPANY
- ANR COAL COMPANY
- ANR WESTERN COAL DEVELOPMENT COMPANY
- BROOKS RUN COAL COMPANY
- APACHE MINING COMPANY
- VICC LAND COMPANY
- VIRGINIA IRON, COAL AND COKE COMPANY
- VICCO COAL COMPANY
- VICCO INTERNATIONAL SALES CORPORATION
- VICCO LEASING COMPANY
- ANR FREIGHT SYSTEM, INC.
- ASSOCIATED TRUCK LINES, INC.
- ASSOCIATED TRUCK LINES OF CANADA, INC.
- GARRETT FREIGHTLINES, INC.
- GRAVES TRUCK LINE
- ROAD EQUIPMENT FINANCING, INC.
- NEUENDORF TRANSPORTATION COMPANY
- NEW LIFE TRANSPORT PARTS CENTER, INC.
- UNITED TRUCK RENTALS, INC.
- ANG COAL GASIFICATION COMPANY
- ANR GASIFICATION PROPERTIES COMPANY

ANR MEDIA COMPANY
ANR STORAGE COMPANY
ANR WESTERN STORAGE COMPANY
AMERICAN NATURAL ALASKAN COMPANY
AMERICAN NATURAL ARCTIC COMPANY
GREAT LAKES GAS TRANSMISSION COMPANY
TRANSCANADA PIPELINES LIMITED

ARANSAS NATURAL GAS COMPANY

ARIZONA PUBLIC SERVICE COMPANY

ARKANSAS OKLAHOMA GAS CORPORATION

ARKANSAS WESTERN GAS COMPANY
SOUTHWESTERN ENERGY COMPANY

ARKLA, INC.

ASHLAND GAS COMPANY

ATLANTA GAS LIGHT COMPANY

BALTIMORE GAS AND ELECTRIC COMPANY
SAFE HARBOR WATER POWER CORPORATION

BATTLE CREEK GAS COMPANY

BAY STATE GAS COMPANY
FITCHBURG GAS AND ELECTRIC LIGHT COMPANY
BOUNDARY GAS, INC.

BERKSHIRE GAS COMPANY

BOONVILLE NATURAL GAS CORPORATION

BOSTON GAS COMPANY
EASTERN GAS AND FUEL ASSOCIATES

BOWLING GREEN GAS COMPANY

BROOKLYN UNION GAS COMPANY
BOUNDARY GAS INC.

HONEOYE STORAGE CORPORATION
VIKING MANUFACTURING CORPORATION

CABOR CORPORATION OF WEST VIRGINIA, A DIVISION OF CABOR CORPORATION OF MASSACHUSETTS

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COLONIAL GAS COMPANY
TRANSGAS INC.
MASSACHUSETTS ASSOCIATES, INC.

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APOLLO GAS COMPANY

CAROLINA PIPELINE COMPANY
CAROLINA ENERGIES, INC.

CASCADE NATURAL GAS CORPORATION

CENTRAL FLORIDA GAS CORPORATION

CENTRAL HUDSON GAS & ELECTRIC CORPORATION

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
ELECTRIC ENERGY, INC.

CHATTANOOGA GAS COMPANY, A DIVISION OF JUPITER INDUSTRIES, INC.

CHESAPEAKE UTILITIES CORPORATION

CHEYENNE LIGHT FUEL & POWER COMPANY

THE CINCINNATI GAS & ELECTRIC COMPANY
THE UNION LIGHT, HEAT AND POWER COMPANY

CITIES SERVICE GAS COMPANY
CITIES SERVICE COMPANY

CITIZENS GAS & COKE UTILITY

CITIZENS GAS FUEL COMPANY

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CITY GAS COMPANY

CITY OF RICHMOND, DEPARTMENT OF PUBLIC UTILITIES

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COLORADO INTERSTATE GAS COMPANY
- THE COASTAL CORPORATION
- CIG EXPLORATION, INC.

THE COLUMBIA GAS SYSTEM, INC.
- COLUMBIA GAS SYSTEM SERVICE CORPORATION
- COLUMBIA LNG CORPORATION
- COLUMBIA ALASKAN GAS TRANSMISSION CORPORATION
- COLUMBIA COAL GAS TRANSMISSION CORPORATION
- COLUMBIA COAL GASIFICATION CORPORATION
- COLUMBIA HYDROCARBON CORPORATION
- THE INLAND GAS COMPANY, INC.
- COLUMBIA GAS OF KENTUCKY, INC.
- COLUMBIA GAS OF MARYLAND, INC.
- COLUMBIA GAS OF NEW YORK, INC.
- COLUMBIA GAS OF OHIO, INC.
- COLUMBIA GAS OF PENNSYLVANIA, INC.
- COLUMBIA GAS OF VIRGINIA, INC.
- COLUMBIA GAS OF WEST VIRGINIA, INC.
- COLUMBIA GAS TRANSMISSION CORPORATION
- COLUMBIA GAS DEVELOPMENT OF CANADA LTD.
- COMMONWEALTH GAS SERVICES, INC.
- COMMONWEALTH GAS PIPELINE CORPORATION
- COMMONWEALTH PROPANE, INC.
- COLUMBIA GULF TRANSMISSION COMPANY
- BIG MARSH OIL COMPANY

HENRICO GAS SERVICE CORPORATION
ATLANTIC ENERGY, INC.

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COMMONWEALTH GAS COMPANY
CAMBRIDGE ELECTRIC LIGHT COMPANY
CANAL ELECTRIC COMPANY
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COMMONWEALTH GAS COMPANY
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COM/ENERGY CAMBRIDGE REALTY
COM/ENERGY EXPLORATION COMPANY
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COM/ENERGY REALTY TRUST
COM/ENERGY RESEARCH PARK REALTY
COM/ENERGY SERVICES COMPANY
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HARTFORD STEAM COMPANY
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BOUNDARY GAS, INC.

CONSOLIDATED NATURAL GAS COMPANY
CONSOLIDATED NATURAL GAS SERVICE COMPANY, INC.
CONSOLIDATED GAS SUPPLY CORPORATION
THE EAST OHIO GAS COMPANY
THE PEOPLES NATURAL GAS COMPANY
THE RIVER GAS COMPANY

WEST OHIO GAS COMPANY
CNG PRODUCING COMPANY
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DELMARVA POWER & LIGHT COMPANY

DISTRIGAS CORPORATION

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ENERCO, INC.
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HAWAIIAN INDEPENDENT REFINERY, INC.
PRI INTERNATIONAL, INC.
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PRI NORTHWEST, INC.
PRIVITY, INC.
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PACIFIC RESOURCES, LTD.
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BREWER PACIFIC AGRONOMICS CO.

GAS LIGHT COMPANY OF COLUMBUS

GAS SERVICE COMPANY

GAS SERVICE, INC.

GAS UTILITIES COMPANY

GREAT FALLS GAS COMPANY

GREAT RIVER GAS COMPANY

GREELEY GAS COMPANY

GULF NATURAL GAS CORPORATION

HAVERHILL GAS COMPANY

HOOSIER GAS CORPORATION

HOUSTON NATURAL GAS CORPORATION
- OASIS PIPE LINE COMPANY
- HT GATHERING COMPANY
- RED RIVER PIPELINE
- RED RIVER PIPELINE CORPORATION
- SAN MARCO PIPELINE COMPANY
- MATAGORDA TERMINALS, LTD.
- MATAGORDA PLANT
- ROBSTOWN PLANT
- HOUSTON PIPELINE COMPANY

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INDIANA GAS COMPANY, INC.

INDIANA NATURAL GAS CORPORATION

INDIANA UTILITIES CORPORATION

INDIANTOWN GAS CO. INC.

INTERMOUNTAIN GAS COMPANY
- INTERMOUNTAIN GAS INDUSTRIES, INC.

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IOWA POWER AND LIGHT COMPANY
- IOWA RESOURCES INC.
- ENERCOR, INC.
- IOWA POWER RESOURCES, INC.
- REDLANDS, INC.

MIDDLEWOOD, INC.
IOWA COMPUTER RESOURCES INC.
UNITRAIN INC.
WESCON INDUSTRIES, INC.
ENSERCO, INC.
H. L. HOAK COMPANY, INC.

IOWA PUBLIC SERVICE COMPANY

JACKSON UTILITY DIVISION, CITY OF JACKSON, TENN.

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MICHIGAN GAS UTILITIES COMPANY
- MICHIGAN ENERGY RESOURCES COMPANY
- SOUTHERN MICHIGAN PRODUCTION COMPANY
- COMMUNICATIONS AND CABLEVISION, INC.
- KENERGY PETROLEUM CORPORATION
- MGU DEVELOPMENT CO.

MIDCON CORP.
- ANTHRUST, INC.
- BUCKHORN PETROLEUM CO.
- CHAPPERAL COAL CORPORATION
- E.K. COAL CO., INC.
- EMPIRE COAL COMPANY
- EXETER CANADIAN EXPLORATION, LTD.
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- EXETER COMPANY
- EXETER DRILLING CENTRAL, INC.
- EXETER DRILLING NORTHERN, INC.
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- EXETER SERVICE COMPANY
- EXETER VENTURES CORPORATION
- FAIRWAY COAL COMPANY
- HARPER OIL COMPANY
- INDUSTRIAL FUELS CORPORATION
- M & O COAL COMPANY
- NAAACO, INC. (Del.)
- NAERCO, INC.
- NALOCO, INC. (Del.)
- NANBCO INC.

NAPECO INC.
NATOCO, INC.
NATURAL GAS PIPELING COMPANY OF AMERICA
NATURAL-TRINIDAD AND TOBAGO ENGINEERING COMPANY
NGPL-CANYON COMPRESSION CO.
NGPL EXPLORATION COMPANY
NGPL LIQUIDS, INC.
NGP-LNG, INC.
NGPL-OVERTHRUST INC.
NGPL TERMINAL COMPANY
NGPL-TRAILBLAZER INC.
NGLP WILLISTON, INC.
MCN EXPLORATION COMPANY
NGPL OFFSHORE COMPANY
MCN OVERSEAS INC.
MCN-TRINIDAD AND TOBAGO LNG COMPANY
MCN COAL GASIFICATION COMPANY
NORTH SHORE GAS COMPANY
PEOPLES ENERGY CORPORATION
PEOPLES GAS LIGHT & COKE COMPANY
PRATER CREED PROCESSING COMPANY
RED CEDAR MINING COMPANY, INC.
TEXOMA PRODUCTION COMPANY
TWIN OAKS COAL COMPANY
UMET MINING CORPORATION
WEATCOAL CORPORATION
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MOBILE GAS SERVICE CORPORATION

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MT. CARMEL PUBLIC UTILITY CO.

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- ALABAMA OXYGEN COMPANY, INC.
- TENNESSEE OXYGEN COMPANY

NATIONAL FUEL GAS DISTRIBUTION CORPORATION
- NATIONAL FUEL GAS COMPANY
- NATIONAL FUEL GAS SUPPLY CORPORATION
- SENECA RESOURCES CORPORATION
- PENN-YORK ENERGY CORPORATION

NEW JERSEY NATURAL GAS COMPANY
- NEW JERSEY RESOURCES CORPORATION
- GAS ASSOCIATED SERVICES, INC.
- NEW JERSEY NATURAL RESOURCES COMPANY

NEW ORLEANS PUBLIC SERVICE INC.
- MIDDLE SOUTH UTILITIES, INC.
- SYSTEM FUELS, INC.
- ARKANSAS POWER & LIGHT COMPANY
- LOUISIANA POWER & LIGHT COMPANY
- MISSISSIPPI POWER & LIGHT COMPANY
- MIDDLE SOUTH SERVICES, INC.
- MIDDLE SOUTH ENERGY, INC.

NEW YORK STATE ELECTRIC & GAS CORPORATION
- SOMERSET RAILROAD CORPORATION

NIAGARA MOHAWK POWER CORPORATION
- BEEBEE ISLAND CORPORATION
- MOREAU MANUFACTURING CORPORATION

NORCO GAS & FUEL CO., INC.

NORTH ATTLEBORO GAS COMPANY

NORTH CAROLINA NATURAL GAS CORPORATION

NORTH CENTRAL PUBLIC SERVICE CO.
DONOVAN COMPANIES, INC.
SOUTHERN GAS COMPANY

NORTH PENN GAS COMPANY
PENN FUEL SYSTEM, INC.
PENN FUEL GAS, INC.

NORTHEAST UTILITIES COMPANY

NORTHERN ILLINOIS GAS COMPANY
NICOR INC.

NORTHERN INDIANA FUEL & LIGHT COMPANY

NORTHERN INDIANA PUBLIC SERVICE COMPANY

NORTHERN NATURAL GAS COMPANY

NORTHERN STATES POWER COMPANY, A MINNESOTA COMPANY
NORTHERN STATE POWER COMPANY, A MINNESOTA CORPORATION
LAKE SUPERIOR DISTRICT POWER COMPANY
NORTHERN STATE POWER COMPANY
CORMORANT CORPORATION
UNITED POWER & LAND COMPANY

NORTHERN UTILITIES, INC.

NORTHWEST ALASKAN PIPELINE COMPANY

NORTHWEST NATURAL GAS COMPANY

NORTHWEST PIPELINE CORPORATION
NORTHWEST ENERGY COMPANY
PHILLIPS PACIFIC CHEMICAL COMPANY

NORTHWESTERN PUBLIC SERVICE COMPANY

OAKRIDGE UTILITY DISTRICT

OHIO GAS COMPANY

OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK, INC.

ORANGE AND ROCKLAND UTILITIES, INC.
ROCKLAND ELECTRIC COMPANY
PIKE COUNTY LIGHT & POWER COMPANY
O&R ENERGY DEVELOPMENT, INC.
CLOVE DEVELOPMENT CORP.

PACIFIC GAS AND ELECTRIC COMPANY
PACIFIC GAS TRANSMISSION COMPANY
PACIFIC INDONESIA LNG COMPANY
STANDARD PACIFIC GAS LINE INCORPORATED
ALBERTA NATURAL GAS COMPANY
PACIFIC TRANSMISSION SUPPLY COMPANY
ROCKY MOUNTAIN GAS TRANSMISSION COMPANY

PANHANDLE EASTERN PIPE LINE COMPANY
PANHANDLE EASTERN CORPORATION
NATIONAL DISTILLERS AND CHEMICAL CORPORATION
NATIONAL HELIUM CORPORATION

PENNSYLVANIA & SOUTHERN GAS COMPANY

PENNSYLVANIA GAS & WATER COMPANY

PEOPLES GAS SYSTEM, INC.

PEOPLES NATURAL GAS COMPANY OF SOUTH CAROLINA

PEOPLES NATURAL GAS COMPANY, A DIVISION OF INTERNORTH, INC.

PEQUOT GAS COMPANY

PHILADELPHIA ELECTRIC COMPANY

PHILADELPHIA GAS WORKS

PIEDMONT NATURAL GAS COMPANY, INC.

POLARIS CORPORATION

THE PROVIDENCE GAS COMPANY
PROVIDENCE ENERGY CORPORATION
NEWPORT AMERICA CORPORATION
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PRUDENCE CORPORATION
RESOURCE MONITORS, INC.

PUBLIC SERVICE COMPANY OF COLORADO
PUBLIC SERVICE COMPANY OF COLORADO
HOME LIGHT AND POWER COMPANY

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

RICHMOND GAS CORPORATION

RIVER GAS COMPANY

ROANOKE GAS COMPANY

ROCHESTER GAS AND ELECTRIC CORPORATION

ROCKY MOUNTAIN NATURAL GAS COMPANY, INC.
GASCO, INC.
RMNG GATHERING CO., INC.
INDUSTRIAL MECHANICS, INC.

SAN DIEGO GAS & ELECTRIC COMPANY

SIERRA PACIFIC POWER COMPANY

SOUTH CAROLINA ELECTRIC & GAS COMPANY
CAROLINA ENERGIES, INC.

SOUTH COUNTY GAS

SOUTH FLORIDA NATURAL GAS COMPANY

SOUTH JERSEY GAS COMPANY
- SOUTH JERSEY INDUSTRIES, INC.
- ENERGY & MINERALS, INC.
- JESSEE S. MORIE & SON, INC.
- SOUTH JERSEY FUEL, INC.
- DELAWARE VALLEY INDUSTRIAL GASES, INC.
- SOUTH JERSEY EXPLORATION COMPANY
- SOUTH JERSEY ENERGY COMPANY

SOUTHEASTERN MICHIGAN GAS COMPANY
- SOUTHEASTERN MICHIGAN GAS ENTERPRISES
- SOUTHEASTERN MICHIGAN ENGINE SPECIALISTS, INC.
- SOUTHEASTERN EXPLORATION COMPANY

SOUTHERN CALIFORNIA GAS COMPANY
- PACIFIC LIGHTING CORPORATION
- ANKIRK DEVELOPMENT CORPORATION
- BLACKFIELD HAWAII CORPORATION
- CALIFORNIA LNG COMPANY
- CENTRAL PLANTS, INC.
- DUAL FUEL INTERNATIONAL, INC.
- DUAL FUEL PRODUCTS, INC.
- DUAL FUEL SYSTEMS, INC.
- DUNN PROPERTIES CORPORATION
- DUNN PROPERTIES OF GEORGIA, INC.
- DUNN PROPERTIES OF TEXAS, INC.
- FREDERICKS SALES, INC.
- FREDERICKS DEVELOPMENT CORPORATION
- FUEL INDUSTRIES NEW ZEALAND LIMITED
- GENERAL COMMUNICATIONS COMPANY OF AMERICA
- GENERAL SCIENTIFIC COMPANY
- HAWAII MANAGEMENT CORPORATION
- MAYFLOWER REALTY ASSOCIATES, INC.

PACIFIC ALASKA LNG COMPANY
PACIFIC COAL GASIFICATION COMPANY
PACIFIC ENERGY RESOURCES COMPANY
PACIFIC INDONESIA LNG COMPANY
PACIFIC INTERSTATE COMPANY
PACIFIC INTERSTATE TRANSMISSION COMPANY
PACIFIC INTERSTATE TRANSMISSION COMPANY (ARCTIC)
PACIFIC INTERSTATE TRANSMISSION COMPANY (Rocky Mountain)
PACIFIC INTERSTATE OFFSHORE COMPANY
PACIFIC LIGHTING EXPLORATION COMPANY
PACIFIC LIGHTING FUELS DEVELOPMENT COMPANY
PACIFIC LIGHTING GAS DEVELOPMENT (Canada) LTD.
PACIFIC LIGHTING GAS DEVELOPMENT COMPANY
PACIFIC LIGHTING GAS SUPPLY COMPANY
PACIFIC LIGHTING INTERNATIONAL FINANCE N. V.
PACIFIC LIGHTING LAND COMPANY
PACIFIC LIGHTING LEASING COMPANY
PACIFIC LIGHTING MARINE COMPANY
PACIFIC LIGHTING OVERSEAS FINANCE N. V.
PACIFIC LIGHTING PROPERTIES, INC.
PACIFIC OFFSHORE PIPELINE COMPANY
PACIFIC REAL ESTATE PROJECTS, INC.
S. M. DUNN, INC.
SMA DEVELOPMENT CORPORATION
SOUTHERN CALIFORNIA CONSERVATION FINANCING CO.
SOUTHERN CALIFORNIA GAS COMPANY
SOUTHERN CALIFORNIA SOLAR FINANCING COMPANY
WESTERN LNG TERMINAL COMPANY

THE SOUTHERN CONNECTICUT GAS COMPANY
CONNECTICUT ENERGY CORPORATION

GAS STORAGE, INC.
ONSET MARKETING CORPORATION
RESOURCE PRODUCTION, INC.
SCG GAS QUEST, INC.
SCG PIPELINES, INC.
ECON, INC.

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

SOUTHERN NATURAL GAS COMPANY
SONAT, INC.

SOUTHERN UNION COMPANY

SOUTHWEST GAS CORPORATION
DON A HARRIS & ASSOCIATES, INC.

SOUTHWESTERN VIRGINIA GAS COMPANY
SOUTHWESTERN VIRGINIA ENERGY INDS., LTD
MIDWAY BOTTLED GAS COMPANY, INC.
SOUTHWESTERN VIRGINIA GAS SERVICE CORPORATION

ST. LAWRENCE GAS COMPANY, INC.
THE CONSUMERS' GAS COMPANY LTD.

SUFFOLK GAS CORPORATION

SUPERIOR WATER, LIGHT AND POWER COMPANY

SYRACUSE SUBURBAN GAS COMPANY, INC.

TENNESSEE GAS PIPELINE COMPANY

TENNESSEE GAS TRANSMISSION COMPANY
TENNECO INC.

TENNESSEE-VIRGINIA ENERGY CORPORATION

TERRE HAUTE GAS CORPORATION

TEXAS EASTERN GAS PIPELINE COMPANY

TEXAS GAS TRANSMISSION CORPORATION
- AMCOM, INC.
- AMERICAN CARRIERS, INC.
- AMERICAN FREIGHT SYSTEM, INC.
- ALL-AMERICAN REDEVELOPMENT CORPORATION
- ATLANTIC TRANSPORT SERVICE, INC.
- TRANSPORT BROKERAGE, INC.
- M.C.T. SERVICES, INC.
- MIDWEST COAST TRANSPORT, INC.
- SIOUX FALLS SERVICE CENTER, INC.
- AMERICAN COMMERCIAL BARGE LINE COMPANY
- AMERICAN COMMERCIAL CREDIT CORPORATION
- AMERICAN COMMERICAL LEASING COMPANY
- AMERICAN COMMERCIAL TERMINALS, INC.
- BAUER DREDGING CO., INC.
- COMMERCIAL ARGE LINE COMPANY
- COMMERCIAL CARRIERS, INC. (MICHIGAN)
- COMMERCIAL CARRIERS, INC. (ILLINOIS)
- NATIONAL TRUCKING COMPANY
- INLAND TUGS CO.
- JEFFBOAT, INCORPORATED
- LOUISIANA DOCK COMPANY, INC.
- MAC TOWING COMPANY, INC.
- WATERWAY COMMUNICATIONS SYSTEM, INC.
- TEXAS GAS SYNFUEL CORPORATION
- TXG RESOURCES, INC.
- TEXAS GAS EXPLORATION (U.K.) CORPORATION
- TEXAS GAS EXPLORATION (U.K.) LIMITED

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
- TRANSCO COMPANIES, INC.
- BORDER GAS, INC. (CLOSE CORPORATION)

TRUNKLINE GAS COMPANY

TWIN GAS COMPANY

UGI CORPORATION

UNION LIGHT, HEAT & POWER COMPANY, INC.

UNION OIL & GAS INC.

UNITED CITIES GAS COMPANY

UNITED GAS PIPELINE COMPANY
- UNITED ENERGY RESOURCES, INC.
- SEA ROBIN PIPELINE COMPANY
- HIGH ISLAND OFFSHORE SYSTEM (HIOS)
- U-T OFFSHOORE SYSTEM (UTOS)
- NORTHERN BORDER PIPELINE COMPANY
- ALASKAN NORTHWEST NATURAL GAS TRANSPORTATION COMPANY
- TRANS-ANADARKO PIPELINE SYSTEM

VALLEY GAS COMPANY
- VALLEY RESOURCES, INC.
- VALLEY PROPANE, INC.
- VAMCO
- RIDEC

VERMONT GAS SYSTEMS, INC.

VIRGINIA NATURAL GAS, A DIVISION OF VIRGINIA ELECTRIC AND POWER COMPANY

WASHINGTON GAS LIGHT COMPANY

WASHINGTON NATURAL GAS COMPANY
- WASHINGTON ENERGY COMPANY
- THERMAL ENERGY, INC.
- THERMAL EXPLORATION, INC.
- THERMAL EFFICIENCY, INC.
- THERMRAIL, INC.

WASHINGTON WATER POWER COMPANY

WEST OHIO GAS COMPANY

WESTERN KENTUCKY GAS COMPANY

WESTERN SLOPE GAS COMPANY

WISCONSIN FUEL AND LIGHT COMPANY
ENEREX EXPLORATION

WISCONSIN GAS COMPANY

WISCONSIN NATURAL GAS COMPANY
WISCONSIN ELECTRIC POWER COMPANY
WISCONSIN MICHIGAN POWER CO., INC.
WISCONSIN ENERGY CORP.
WEPCO ACQUISITIONS, INC.
BADGER SERVICE CO.

WISCONSIN POWER AND LIGHT COMPANY
WISCONSIN RIVER POWER COMPANY

WISCONSIN SOUTHERN GAS COMPANY
J. H. FAGAN COMPANY

WYOMING GAS COMPANY

Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
SEP 3 1982
ALEXANDER L. STEVAS,
CLERK

THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
Appellees.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PROCESS GAS CONSUMERS GROUP,
THE AMERICAN IRON AND STEEL INSTITUTE,
AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA,
CONSUMER FEDERATION OF AMERICA, and
PUBLIC CITIZEN, INC.,
Appellees.*

INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA and
UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

** There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1]In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution – that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

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[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
John Cary Sims

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Counsel for Appellees-Respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen

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Nos. 81-2068, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

In the Supreme Court of the United States

OCTOBER TERM, 1982

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v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2008

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2020

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2151

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2171

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-177

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-209

UNITED STATES HOUSE OF REPRESENTATIVES,
PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

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[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC:[3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

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[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 22-23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

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fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

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[8] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

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No. 81-2171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN GAS ASSOCIATION,

Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,

On Appeal From The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF APPELLANT AMERICAN GAS ASSOCIATION OPPOSING MEMORANDA TO LIMIT REVIEW

JOHN A. MYLER

American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Attorney for Appellant

Counsel of Record

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The Solicitor General has recommended that the Court should limit the questions in this case, wherein the jurisdiction of this Court is being invoked under 28 U.S.C. §1252, to the ultimate constitutionality of section 202(c) of the Natural Gas Policy Act and its severability from the remainder of section 202.[1] Treating the memoranda of the United States and of the appellees-respondents in their true light as limited Motions to Dismiss, the American Gas Association submits its opposition to the motions, pursuant to Rule 16.5 of this Court.[2]

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[1] Memorandum for the United States, 20. The Consumer Energy Council of America goes even further and would limit this Court's consideration to the constitutionality of the legislative veto. Memorandum of Appellees-Respondents, 10.

[2] The American Gas Association no longer represents the Michigan Consolidated Gas Company, listed at page A-10 of the Appendix to the Jurisdictional Statement filed herein.

The suggestions to limit the issues herein are totally without merit, are based on no cited authority, and are directly contrary to prior holdings of this Court. In *McLucas* v. *DeChamplain*[3], the Court noted that:

> an appeal under §1252 brings before us, not only the constitutional question, but the whole case, e.g. *United States* v. *Raines*, [362 U.S.] at 27 n. 7; *see* 9 J. Moore Federal Practice, §110.03[5], p. 96 (2nd ed. 1973), including threshold issues of subject-matter jurisdiction, *United States* v. *American Friends Service Committee*, 419 U.S. 7, 12 n. 7 (1974), and whether a three-judge court was required, *Fleming* v. *Nestor*, 363 U.S. 603 (1960).

In *United States* v. *Raines*[4], Justice Brennan, delivering the opinion of the Court, noted that:

> [t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power – 'the gravest and most delicate duty that this Court is called on to perform.' [Quoting Holmes, J., in *Blodgett* v. *Holden*, 275 U.S. 142 (1927)] *Marbury* v. *Madison* (U.S.) 1 Cranch 137, 177-80. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal right of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which

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[3] 421 U.S. 21, 31-32 (1975).

[4] 362 U.S. at 20-21 (1960).

it is to be applied.' *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33.

The Court also read the "broad nature" of 28 U.S.C. §1252 as indicating "a desire of Congress that the whole case come up." 362 U.S. 17, 27 n. 7. That desire is eminently reasonable in light of the gravity of the Court's responsibility in its review of any judicial decision purporting to invalidate an act of Congress. In this case, there are three preliminary issues, appropriate resolution of any of which precludes the Court from considering the merits of appellees-respondent's constitutional challenge.[5] Indeed, it would be appropriate, on the basis of pleadings now filed, for the Court to exercise its jurisdiction in this case immediately by dismissing the original petitions for review filed in the circuit court by appellees-respondents. Insofar as this Court is impressed by the executive branch's belief that the question of the constitutionality of the veto device used as a legislative tool by Congress manifestly warrants quick resolution[6], the Solicitor General has noted the pending challenge to the two-House veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980 now awaiting oral argument on October 12, 1982, before the United States Court of Appeals for the District of Columbia Circuit. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737.[7]

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[5] Jurisdictional Statement of American Gas Association, 13-20; the three issues include (a) Article III requirements, (b) severability, and (c) mootness.

[6] Memorandum for the United States, 12.

[7] Memorandum for the United States, 18 n. 5.

CONCLUSION

If the Court concludes that it cannot dismiss, on the basis of argument already before the Court, the petitions for review originally filed by appellees-respondents, the Court should note probable jurisdiction of each of the questions presented in this case, and require full briefing and argument thereon.

JOHN A. MYLER

American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Counsel of Record